IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6611 OF 2006

Shri Dayal Singh Dhupar ..Petitioner

Vs.

Shri C.T.Kripalani & 3 Ors. ..Respondents

Mr.Rajesh Behere for the petitioner

Mr.C.T.Kripalini for the respondent no.1 in peron

Mr.Hitesh Jain i/b ALMT Legal for respondent no.2 to 4

CORAM : A.P.DESHPANDE, J

DATED : 15TH DECEMBER, 2006

P.C.:

1. The respondent which is a condominium instituted a suit for recovery of sum of Rs.47,000 and odd and a further prayer is made to create a charge on apartment of the present respondent bearing no.A-204. The defendants / respondents are challenging the very locus of the plaintiff to claim the amount on the ground that in an earlier suit, the said issue is subjudice. The defendants herein had filed a regular Civil Suit no.633 of 1994 but the same was dismissed by the trial court.

The first appeal carried to the District Court was also dismissed and aggrieved thereby, the second appeal was filed by the respondent no.1 in the High Court which has been admitted touching the following substantial questions of law. The said questions reads thus:

> I. Whether under an Agreement for sale executed under the Maharashtra Ownership of Flats Act, 1963 (M.O.F.A.), the promoter / developer, who is NOT the owner of the land can subsequently, subject the property that is the land and the building constructed thereupon to the provisions of Maharasthra Ownership of Apartments Act, 1970 (M.O.A.A.) and in violation of the provisions of section 3(h) of the MOFA.
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> II. Whether the land in respect of which exemption has been granted under sec 20(1)(a) of the Urban Land Ceiling Act, 1976 on the condition that the property constructed thereon would be governed by the provisions of the MOFA / The Co-operative Societies Act, 1960 can be subject to the provisions of MOAA by the Promoter / Developer, acting as the Constituted Attorney for the owner, and WITHOUT PREJUDICE the Power of attorney.
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> III. Does not subjecting the said property to the provisions of MOAA by the owner or by the Promoter under a Power of Attorney, DEFEAT the very purpose of the Exemption Order granted under sec 20(1)(a) of the Urban Land Ceiling Act and inter alia contrary to the provisions of the ULCA - 76.

2. The defendant filed an application u.s.10 of the Civil Procedure Code by making a prayer for stay of the proceedings of the subsequently instituted suit by contending that the issue involved in the subsequent suit is very much substantially and directly in issue in a suit earlier instituted which is pending in the form of a second Appeal in the High Court. As the trial court found that the matter in issue in the prior suit is substantially and directly in issue in the subsequent suit, the trial curt has allowed the application moved by the defendant and stayed the subsequent suit. Aggrieved thereby this writ petition is filed.

3. It is undisputed that the second appeal is a continuance of the suit and hence, if the matter is directly and substantially an issue in second appeal which arises out of the suit filed prior in point of time, section 10 of the C.P.C. would definitely apply.

4. Perused the order passed by the trial court. I do not find any patent illegality or

perversity requiring interference at the hands of this court in writ Jurisdiction. The trial court is justified in staying the subsequently instituted suit as the matter in issue in the first suit is directly and substantially in issue in the subsequent suit. The submission made by the learned counsel for the petitioner is that the subject matter in both the suits are different. The requirement of section 10 of the C.P.C. is not the identity of the subject matter but it is whether the decision in the earlier suit would operate as res judicata in subsequently instituted suit.

5. The order passed by the court below does not suffer from any illegality. Hence, writ petition is summarily dismissed.

(SHRI A.P.DESHPANDE, J)